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In re Application of

Poisner, et al.

OFFICE OF PETITIONS

Application No: 09/186,056

DECISION ON PETITION

Filed: November 3, 1998

Attorney Docket No. 042390.P6344

This is a decision on the petition titled, "Petition to Correct Filing Date", filed May 3, 2006, which will be treated as a petition under 37 CFR 1.53(e). This is also a decision on the petition to withdraw the holding of abandonment under 37 CFR 1.181(a), filed December 22, 2003.

The petition under 37 CFR 1.181 is **granted**.

The petition under 37 CFR 1.53(e) is also **granted**.

TREATMENT UNDER 37 CFR 1.181

A review of the application file reveals that the application was filed on November 3, 1998, without a properly executed declaration under 37 CFR 1.63. A Notice to File Missing Parts of Nonprovisional Application was mailed on November 19, 1998, requiring a properly executed declaration and surcharge. The record does not reveal that a timely and proper response was filed to the Notice of Missing Parts. The application was abandoned, by operation of law, on January 20, 1999. A Notice of Abandonment was not mailed until October 28, 2003. On December 1, 2004, a "Withdrawal of Previously Sent Notice" was sent withdrawing the Notice of Abandonment. There is no indication that the Notice to File Missing Parts was withdrawn, however. The application was, therefore, abandoned on January 20, 1999, notwithstanding the withdrawal of the Notice of Abandonment.

The instant petition to withdraw the holding of abandonment was filed on December 22, 2003. Petitioner maintains that the Notice to File Missing Parts of Nonprovisional Application was never received.

Section 711.03(c)(II) of the *Manual of Patent Examining Procedure* ("MPEP") provides that in order to establish non-receipt of an Office action so as to prove that the imposition of a holding of abandonment is improper, petitioner must: 1) provide a statement to the Office indicating that the Office action was not

received by petitioner; 2) include in the statement an attestation to the fact that a review of the file jacket and docket records maintained by petitioner indicates that the Office action was not received; and 3) provide a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed.

Petitioner has met the burden of proof as established by Section 711.03(c)(II) of the MPEP. The petition is granted. The holding of abandonment is, therefore, withdrawn.

TREATMENT UNDER 37 CFR 1.53

The record reveals that the filing date for the application was originally November 3, 1998. On filing, the application papers met every requirement of 37 CFR 1.53 necessary to be accorded a filing date. Although the application did not have a executed declaration, it is noted that a declaration is not required to obtain a filing date and the filing of the same at a later point in the prosecution would not result in a change to the filing date.

The record reflects that when the petition to withdraw the holding of abandonment was filed on December 22, 2003, the Office of Initial Patent Examination changed the filing date for the application to December 22, 2003—the date the petition was filed. There is nothing in the record to support the change in the filing date to December 22, 2003. Accordingly, the petition under 37 CFR 1.53 to correct the application filing date is granted. The filing date for the application is November 3, 1998.

The application file is being forwarded to the Office of Initial Patent Examination for restoration of the original filing date of November 3, 1998, and issuance of a corrected filing receipt. Thereafter, the application file will be directed to the Office of Patent Publications for processing into a patent.

Questions concerning this decision should be directed to the undersigned at (571) 272-3222.



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Office of Petitions